

<b>SDG&amp;E Comments</b>	<b>Response to comments</b>
1. SDG&E is entitled to a response to its Request for Rescindment including the Hearing Panel's finding of fact thereon.	The Hearing Panel considered all of the evidence presented by SDG&E, including SDG&E's Request for Rescindment dated May 26, 2011, its rebuttal to other designated parties dated June 23, 2011, expert reports and evidence, including testimony, SDG&E and others presented during the hearing. The TCAO finds that the weight of the evidence supports naming SDG&E as a discharger in Tentative Order No. R9-2012-0024 on the basis of the evidence in the record. The San Diego Water Board disagrees with SDG&E's interpretation of Water Code section 13304. Finally, the relative pollutant contributions of the dischargers raise a question of allocation that is not being decided by the San Diego Water Board.
2. The Hearing Panel's proposed order perpetuates the multiple legal and factual errors into which the Shipyards lead the Cleanup Team.	
3. The proposed order fails to address the Cleanup Team's clear factual errors.	
4. The proposed order disregards the fundamental requirement of "causation" under California law.	

NASSCO Comments	Response to comments
<p>1. The Regional Board should not delete the language indicating that cleanup of the remedial footprint will restore any injury, destruction, or loss of natural resources.</p>	<p>It is appropriate to delete the sentence in Finding 32 of the TCAO that states "Clean-up of the remedial footprint will restore any injury, destruction, or loss of natural resource[,]" as recommended by the Environmental Parties and consistent with the Cleanup Team's response to comments on this topic (see Response to Comments, Aug. 23, 2011, pp. 32-14 through 32-15). The San Diego Water Board anticipates that compliance with the alternative cleanup levels established in TCAO No. R9-2012-0024 will be protective of beneficial uses in the Shipyard Site. The sentence is not necessary to support the TCAO findings about protection of beneficial uses and may lead to unnecessary confusion about the purposes of the order. Therefore, it is appropriate that it be deleted from the TCAO.</p>
<p>2. There is no evidence indicating that sediments at NASSCO are causing the Bay's narrative water quality objectives for toxicity not to be attained.</p>	<p>The TCAO assesses impairment of aquatic life using the Triad and non-triad approach, evaluates aquatic dependent wildlife by conducting an Ecological Risk Assessment, and evaluates human health impairment using a Human Health Risk Assessment. The TCAO finds that the aquatic life (e.g., benthic community), aquatic dependent wildlife, and selected human health beneficial uses are impaired based on the results of the Triad and non-triad analyses, and risk assessments included in the DTR (see Findings 12, 14, 21 and 25; and associated sections of the DTR). The Panel recommends that the San Diego Water Board clarify through addition of this sentence that the impairment of the identified beneficial uses means that the narrative toxicity objective is not attained at the Shipyard Sediment Cleanup Site. Addition of this sentence clarifies, but does not alter, the findings in the TCAO regarding impairment of beneficial uses at the Shipyard Sediment Cleanup Site.</p>

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<p>3. The Regional Board's oversight costs should be addressed separately from the adoption of the CAO and EIR.</p>	<p>Pursuant to Water Code section 13304, the San Diego Water Board and State Water Board may recover from dischargers the reasonable costs actually incurred by the Water Boards to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action. (See Finding 41 and Provision H. 1.) Cost recovery under section 13304 is subject to certain procedural and documentary requirements under Water Code section 13365.</p>
<p>3.a. The Regional Board must specify the oversight costs for which it seeks recovery, and demonstrate that such expenditures were actually incurred and reasonable.</p>	<p>Documentation of the San Diego Water Board staff costs included in the TCAO for some time periods is incomplete. Therefore, errata have been prepared to delete dollar amounts associated with unreimbursed staff costs in the TCAO and corresponding finding in the DTR, and to make other related changes.</p>
<p>3.b. Oversight costs related to digitization of the administrative record are not reimbursable under the California Water Code.</p>	<p>In order to recognize a process for the Boards to seek recovery of past and future oversight costs, Finding 41 of the TCAO will also be amended to provide that the Chair may designate an individual pursuant to Water Code section 13365, subdivision (c)(4), to resolve disputes about the reasonableness of and documentary support for past and future oversight costs the San Diego Water Board or State Water Board seek to recover from the dischargers.</p>
<p>3.c. Oversight costs more than three years old are time-barred.</p>	<p>The TCAO is also amended to explicitly recognize that the Assistant Executive Officer, James Smith, may amend the Cleanup and Abatement Order as necessary to include any amounts derived through the dispute resolution process and determined to be owed by the discharger(s).</p> <p>The San Diego Water Board disagrees with NASSCO's assertion that the recovery of payments to DM Information Services to produce the electronic administrative record for this matter is not reasonable and is duplicative of digitization work the San Diego Water Board already intended to perform. The costs are very</p>

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	<p>reasonable to support development of the TCAO and DTR particularly given, among other considerations, the need to make the extensive technical files available and accessible through indexing to the large number of dischargers and other designated parties involved in the proceeding as well as to the public. The digitization of the record for this matter was necessary to facilitate information exchange among designated parties and interested persons and to improve access to the Board records for this matter. The San Diego Water Board obtained Cleanup and Abatement Account (CAA) funds for the digitization and indexing of the record with the intention of eventually recovering the costs to the CAA. Coincidentally, the San Diego Water Board began deployment of an Electronic Content Management (ECM) system designed to maintain board files in an electronic format. To date, the vast majority of files in the ECM system have been digitized and entered into the system <i>as received</i> by the San Diego Water Board. For the most part, paper records existing at the time the ECM system was put in use have not been entered into the ECM system and there is no schedule for doing so.</p> <p>Finally, the San Diego Water Board disagrees that the statute of limitations in section 338 of the Code of Civil Procedure applies to recovery of oversight costs in this administrative proceeding.</p>

<b>Cleanup Team Comments</b>	<b>Response to comments</b>
1. Cost recovery Finding 41 and Directive H.1 of the TCAO should be revised to reflect the most recent invoices issued by the State Water Board Site Cleanup Program	See Response to NASSCO, 3, above.
2. Provision 10. Electronic and paper media reporting requirements of the TCAO should be revised to require that the Dischargers include the new Geotracker site Id of T10000003580 and other information in the subject line of paper and electronic correspondence and documents required under the CAO.	The Advisory Team has prepared errata to modify Tentative Order No. R9-2012-0024, Provision 10 to reflect the requested modification.

<b>BAE Systems San Diego Ship repair Inc.'s Comments</b>	<b>Response to comments</b>
<p>1. Revised Finding 5 - Removal of Star &amp; Crescent Boat Co. - The panel's recommendation to decline to decide the legal and factual questions necessary to determine whether Star &amp; Crescent is the legal successor to San Diego Marine Construction Co. should be rejected for two reasons.</p>	
<p>a. To be named a discharger, all that is required is "sufficient evidence" of responsibility. The "State Water Board requires that the Regional Board name in a CAO all dischargers who contributed to a condition of pollution or nuisance to the maximum extent of the law." (CUT 8/23/11 Response to Comments Report, at 1-23). Here, several parties submitted extensive evidence and argument regarding the Star &amp; Crescent successor issues, and the Cleanup Team after dutifully wading through all of it, concluded that Star &amp; Crescent shall be named a Discharger.</p>	<p>The San Diego Water Board has discretion whether to name an entity as a discharger under Water Code section 13304. In the event the federal court litigation resolves the corporate successor issue, TCAO No. R9-2012-0024 would direct the Cleanup Team to reevaluate whether to identify Star &amp; Crescent as a discharger at that time. In the event the federal court does not make a determination on corporate successor liability, the San Diego Water Board retains discretion to reevaluate Star &amp; Crescent's status as corporate successor and amend the Order as appropriate.</p>
<p>b. The parties, including Star &amp; Crescent are engaged in mediation with the aim of resolving all allocation issues and settling the matter in its entirety. Thus it is far from certain that the District Court will have the opportunity to, and in fact will, address the Star &amp; crescent successor issues. Under the current recommendation from the panel, without that finding the Regional Board will likely not have grounds to amend the order to add Star &amp; Crescent as a discharger.</p>	

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<p>2. Revised Finding 12; DTR Section 12.1 - pertain to Clean Water Act, Section 303(d) listing. The second sentence of TCAO Finding 12 has been revised as follows: These pollutants are impairing the aquatic life, aquatic-dependent wildlife, and human health beneficial uses designated for San Diego Bay <u>and are causing the Bay's narrative water quality objective for toxicity to not be attained.</u></p> <p>These additions are inappropriate and not supported. The TCAO and DTR are based primarily upon the results of the detailed sediment investigation BAE and NASSCO conducted at the Site in 2001-2002 in accordance with guidelines established by the Regional Board. The results of this highly detailed and exhaustive investigation found that risks to human health and aquatic-dependent wildlife at the Site "are well within acceptable levels," that certain risks are attributable to pesticides rather than any of the primary COCs at issue, and concluded that active dredging would provide minimal incremental benefit at a very high cost.</p> <p>And yet the current TCAO and DTR continue to find impairment of aquatic life, aquatic-dependent wildlife, and human health beneficial uses, and provide for extensive active dredging as the primary remedy. To reach these conclusions, the TCAO and DTR rely upon overly protective and unsupported assumptions. These issues have been thoroughly set forth by Designated Parties' expert reports, briefing and evidence, and largely have been acknowledged by the Cleanup Team. The expert testimony and evidence presented at the November evidentiary hearing by expert Dreas Nielsen, Scott Becker, Tom Ginn, and Brent Finley, further established and confirmed the lack of impairment. Thus BAE systems submits it is inappropriate and unsupported to add further new language to the TCAO and DTR asserting impairment to the identified beneficial uses and the alleged causing of the Bay's narrative water quality objective for toxicity to not be attained.</p>	<p>See Response to NASSCO, 2, above.</p>

BAE Systems San Diego Ship repair Inc.'s Comments	Response to comments
<p>3. Revised TCAO Finding 32 - the revised TCAO proposes to delete the sentence "cleanup of the remedial footprint will restore any injury, destruction or loss of natural resource." BAE submits that the sentence was appropriate, supported, and should remain in the TCAO. ...The panel conducted an evidentiary hearing of this matter in November, 2011. However this issue was not raised, and no evidence regarding the natural resources issue was presented by any party.</p>	<p>See Response to NASSCO, 1, above.</p>
<p>4. Revised DTR Page 33-2: TCAO Directive G - The hearing panel's recommended revisions to the TCAO and DTR would "(5) clarify that SW29 not proposed to be dredged may be addressed by a separate regulatory action by the San Diego Water Board." Similarly, revise CAO Directive G states that "[t]he portion of polygon SW29 not in the dredge footprint may be addressed by the San Diego Water Board under a separate future regulatory action based upon available information." BAE submits that if the remainder of SW29 meets the criteria established by the Regional Board for remediation, it should be included within the remedial footprint in the instant TCAO proceeding such that all of BAE's leasehold would be subject to the same remedial standards.</p>	<p>The 2001 data used to develop the 2003 Exponent Report did not indicate that the entirety of polygon SW29 met the criteria for dredging. Since all of polygon SW29 is included in the remedial footprint, It is appropriate to clarify in TCAO No. R9-2012-0024 that the San Diego Water Board may nonetheless choose to address the remainder (the undredged portion) of polygon SW29 under a separate regulatory action based on the information in the record or based upon new information.</p>
<p>5. Revised Finding 41; Directive H-1 - With respect to cost recovery provisions, the Cleanup Team previously agreed that the parties' "request for documentation of the costs sought for reimbursement is reasonable." The Cleanup Team has provided such documentation for certain past unreimbursed costs. BAE Systems requests that the TCAO be revised to reflect this agreement by the Cleanup Team, and order that such documentation must be provided for all costs for which reimbursement is sought.</p>	<p>See Response to NASSCO, 3, above.</p>